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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

**Comments of PacWest Telecomm, Inc.
and the Association for Local Telecommunications Services
in Support of the Petition to Suspend the Compliance Date
Filed by the Cellular Telecommunications Industry Association**

PacWest Telecomm, Inc. and the Association for Local Telecommunications Services ("ALTS") ("Joint Commenters")¹ hereby file their comments in support of the petition to suspend the compliance date for implementation of certain assistance capabilities under the Communications Assistance for Law Enforcement Act ("CALEA") filed by the Cellular Telecommunications Industry Association ("CTIA"). CTIA has asked for a suspension "pending completion of proceedings in this docket on the Court's remand and on receipt and evaluation of the JEM report" on packet mode technologies and the issues that they raise. For all the reasons cited in the CTIA petition, the Commission should suspend the compliance date so that the CALEA requirements can be implemented in the most efficient manner, without undue financial hardship to manufacturers, telecommunications carriers and the public.

Telecommunications carriers, the Commission, law enforcement agencies, and manufacturers have worked diligently over the past few years to comply with the various CALEA requirements. Nonetheless, as the Commission well knows from the number of entities

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¹ PacWest Telecomm is a facilities-based competitive local exchange carrier providing service in California, Washington, Colorado and Nevada. ALTS is the leading trade association representing facilities-based CLECs.

that have filed for an extension of time for compliance with the initial J Standard requirements,² implementation of CALEA has been far more time consuming and complicated than anyone could have predicted three or four years ago. Because of the complexity of the technical issues many carriers have not yet completed the implementation of the first set of CALEA requirements and will not be able to complete those requirements until 2001.³ In light of the fact that even the initial J Standard requirements have not been fully implemented despite the industry's best efforts, the fact that the Commission has not yet indicated what, if anything, it will do in response to the Federal Court's remand of some of the additional CALEA capabilities⁴ and the continuing issues relating to packet mode technologies, the Commission's failure to suspend the compliance date would almost certainly result in wasteful expenditures of scarce resources. There is simply no law enforcement or public interest reason to try to enforce a compliance date when to do so would be inefficient and when the chance is slight that there will be technical solutions reasonably available to allow carriers to comply with as yet uncertain requirements.

I. BACKGROUND

CALEA was enacted in 1994 in order to preserve the government's ability to intercept communications transmitted on advanced technologies such as digital or wireless transmission modes. The law does not expand law enforcement's authority to wiretap; rather, in enacting CALEA, Congress intended to define telecommunications carriers' duties to cooperate with law enforcement, to comply with valid wiretap orders, and to ensure that their equipment is capable

² The Wireless Telecommunications Bureau has reported that more than 150 entities have filed for an extension of time for the implementation of the initial J Standard requirements, see Public Notice Report No. CALEA-001, released June 30, 2000. To our knowledge the Common Carrier Bureau, which almost certainly received the bulk of the applications, has not released any information on the number of petitions filed. It should also be noted that the 150 figure may not reflect the full extent to which carriers have been unable to comply with the June 30 deadline, as many filings were made by the corporate parent for dozens of subsidiaries.

³ It is Joint Commenters' understanding that in fact some carriers probably will not finish implementing the initial requirements until early 2002.

⁴ In fact, the period for filing an appeal of the Court's order has not yet passed, so that there still may be an appeal to the Supreme Court.

of the execution of valid wiretap court orders. While the FCC and law enforcement agencies have significant responsibilities for the implementation of CALEA, it is the manufacturers that must design and produce the technical solutions⁵ and the telecommunications carriers that must work with the manufacturers to upgrade their facilities and equipment to the CALEA standards.

Section 107(a) of CALEA, 47 U.S.C. §1006(a), provides that telecommunications carriers will be deemed CALEA-compliant if they meet publicly available standards adopted by industry. In light of that provision, Subcommittee TR45.2 of the Telecommunications Industry Association (“TIA”) together with the Alliance for Telecommunications Industry Solutions (“ATIS”) developed an interim standard to serve as a “safe harbor” for wireline, cellular, and broadband PCS carriers in 1997. These standards are commonly referred to as the “J Standard.” The Department of Justice believed that the J Standard was underinclusive and did not satisfy CALEA requirements because it failed to include certain specific capabilities, relating, for example, to information about conference calls. Other parties believed that the interim standard was overinclusive, in part because the standard for packet-mode technologies could result in law enforcement obtaining information for which it did not have legal authorization.

In response to these concerns the Commission adopted additional requirements in a Third Report and Order in this proceeding, but deferred the adoption of actual standards to the TIA.⁶ These additional requirements are referred to as the “punchlist items.” Because of the privacy concerns raised by the initial J Standard’s inclusion of packet-mode communications,⁷ the

⁵ CALEA requires manufacturers to make available the features and modifications that are necessary to comply with the capability requirements “on a reasonably timely basis and at a reasonable cost.” 47 U.S.C. § 1005(b).

⁶ In the Matter of the Communications Assistance for law Enforcement Act, Third Report and Order, 14 F.C.C.R. 16,794 (rel. August 31, 1999).

⁷ There was substantial dispute as to whether call content information contained in the packet bodies could be separated from call-identifying information in the packet header. An inability to separate the information could have resulted in data provided to law enforcement pursuant to a pen register order including call content, thus violating CALEA’s privacy protections.

Commission also directed the Telecommunications Industry Association to study any CALEA solutions and to report back to the FCC in one year, September 30, 2000. At the same time the Commission set September 30, 2001, as the date for implementation of the CALEA requirements to packet mode technologies.

As indicated in the CTIA petition, shortly after the adoption of the punchlist items Subcommittee TR45.2 of the Telecommunications Industry Association began work on developing revisions to the J Standard that would be required to implement the additional requirements. While Joint Commenters do not have specific information on many of the manufacturers' activities, it is Joint Commenters' understanding that many manufacturers also have taken significant steps towards development of upgrades that would satisfy all six of the initial punchlist items. It is Joint Commenters' understanding that the punchlist upgrades under development are being developed as a "package" rather than separately.

With respect to the issues relating to packet mode technologies, the Telecommunications Industry Association (TIA) convened a Joint Experts Meeting ("JEM") to prepare a draft report. As of the filing of these Joint Comments, the JEM report has been finalized and sent to TIA. However, TIA has not finished reviewing the report or forwarded it to the Commission. It is expected that the report, either as is or amended, will be forwarded to the Commission by the end of September 2000.

The significant work that has been done by the industry groups was undertaken despite the fact that shortly after release of the Commission's Third Report and Order a number of entities sought federal judicial review of the Order. Last month the United States Court of Appeals for the District of Columbia Circuit ruled on those appeals and vacated and remanded several of the challenged punchlist items, specifically: (1) post-cut through dialed digit extraction; (2) party hold/join/drop information; (3) subject-initiated dialing and signaling

information; and (4) in-band and out-of-band signaling.⁸ In addition, the Court upheld the Commission's decision not to remove the packet mode data requirement from the J Standard.⁹ At the same time, the Court made it clear that CALEA does not alter law enforcement's need for legal authorization for the receipt of any information and that carriers should not provide to law enforcement call content information when the legal authorization covers only call identifying information.

II. THE COMMISSION HAS THE AUTHORITY TO SUSPEND THE COMPLIANCE DATE OF THE PACKET-MODE REQUIREMENTS AND THE REMAINING PUNCHLIST ITEMS

Two sections of CALEA provide the Commission with authority to grant the CTIA petition: Section 107(b), 47 U.S.C. § 1006(b) and Section 107(c)(3), 47 U.S.C. § 1006(c)(3). If the Commission has the authority to grant an extension of the compliance date, it must necessarily have the authority to suspend the compliance date. A suspension is, in effect, a limited extension until the Commission has been able to fully consider the JEM report and the Court of Appeals remand of the four punchlist items.

Section 107(b) allows a party to seek, and the Commission to grant, a "reasonable time for compliance with and the transition to any new standard." Adoption of the punchlist items was the adoption of new standards so that the Commission had authority to implement those

⁸ Petitioners challenged the six capabilities on several grounds, contending that the FCC exceeded its authority under CALEA because at least some of the information required to be made available to law enforcement is neither call content, nor call-identifying information that is reasonably available to the carrier. In addition, Petitioners asserted that the FCC failed to adequately protect the privacy and security of communications not authorized to be intercepted, and to ensure that the capability requirements are implemented by cost-effective methods. The Court determined that the FCC had failed to satisfactorily explain its basis for the conclusion that CALEA required the punchlist items to be included in the J Standard.

⁹ The Court approved the packet mode requirements on the assumption that carriers will have the ability to separate packet addressing and routing information from packet content to avoid disclosures that are not authorized by Court order.

requirements by any reasonable timetable.¹⁰ The D.C. Circuit opinion altered the requirements and thus the Commission plainly has the ability to alter the implementation schedule to permit deliberate consideration and orderly compliance. Likewise, as pointed out in the CTIA petition, the D.C. Circuit's strong language about carriers' duties to supply only that information to law enforcement that is legally required precludes one possible implementation of the CALEA requirements for packet mode technologies that is discussed at length in the JEM report. And, as indicated below, the JEM report itself leaves many issues unresolved. The Commission should not continue to insist on a compliance date – even if a full year away – when there are so many unresolved questions, and the relevant requirements are uncertain.

Section 107(c)(3), 47 U.S.C. § 1006(c)(3), grants the Commission the authority to extend the effective date of the section 103 capability requirements “if the Commission determines that compliance with the assistance capability requirements . . . is not reasonably achievable through application of technology available within the compliance period.” The Commission previously granted a blanket extension of time for the initial J Standard requirements. *See In the Matter of Petition for the Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act*, Memorandum Opinion and Order, FCC 98-223, (released September 11, 1998), 13 FCC Rcd 17990 (1998). The circumstances under which the Commission granted an extension of the compliance date of the initial J Standard were similar to those the Commission and the telecommunications industry face today, although the reasons for grant of an extension at this time are perhaps even more compelling.

The 1998 blanket extension was granted despite arguments raised by law enforcement that, *inter alia*, an extension would interfere with law enforcement's ability to protect the public

¹⁰ A timetable for implementation of the basic Section 103 capability requirements is contained in the Act. Section 107, however, allows the Commission to set a reasonable time (with no specific limitation) for the implementation of new standards.

from criminal activity and that Section 107 did not grant to the Commission the authority to grant a “blanket” extension because the section speaks to requests filed by individual carriers. The Commission noted that in fact the vast majority of wiretap requests would continue to be fulfilled and found that the extension was a “recognition that more time [was] needed to develop technologies that will allow the industry to meet CALEA’s section 103 requirements.”

With respect to the concerns about the Commission’s ability to grant a blanket exception, the Commission found that “granting a blanket extension is both within the Commission’s authority and the most reasonable course of action under the circumstances.” 13 FCC Rcd at 1809. In fact, the Commission viewed the grant of a blanket extension as a means of avoiding even further delay in the implementation of the CALEA requirements¹¹ because the Commission would not be faced with the requirement of considering hundreds of individual requests for extension of time. While the implementation of the initial J Standard has not gone as smoothly as the Commission had hoped, and the initial blanket extension did not prevent the filing of numerous individual requests for extension of time,¹² the Commission’s reasoning in granting the initial blanket extension is as valid today as it was then. The Commission should not enforce an unreasonable compliance date, when there is so much uncertainty in the industry as to what the requirements will ultimately be, but should instead permit enough time for the uncertainties to be resolved before the development of ambiguous and untested new technology requirements in the public telephone network.

¹¹ The Commission noted that if it did not grant a blanket extension, it would likely be “inundated with repetitive filings for extension.”

¹² See note 1 *supra*.

III. ADMINISTRATIVE EFFICIENCY AND THE PUBLIC INTEREST REQUIRE THAT THE COMMISSION SUSPEND THE COMPLIANCE DATE UNTIL IT HAS HAD TIME TO RESPOND TO THE COURT'S REMAND ORDER AND THE TIA REPORT ON PACKET MODE NETWORKS

The September 30, 2001, compliance date for the punchlist items and packet mode technology was set by the Commission in its Third Report and Order in the instant proceeding, which was adopted August 31, 1999. Even at that time, many interested and knowledgeable observers predicted that it would be difficult, if not impossible, for the industry to implement the various requirements by September of 2001.¹³ With the Court of Appeals decision upending portions of the Third Report and Order almost a year after its adoption, the Commission should take the action requested by CTIA to ensure that manufacturers and carriers do not continue efforts (based upon the Commission's rules) to implement requirements that are not yet fully determined.

While Joint Commenters recognize that the Commission may be loathe to suspend a date that is a year away, there is plenty of evidence that a Commission decision not to suspend or extend the compliance date would result in unnecessary expenditures by carriers and manufacturers, and that significant numbers of carriers would be required to file individual petitions for extension of time in any event.

¹³ In a Press Release issued immediately after the Commission's decision, TIA president Mathew J. Flanigan stated "As TIA and other members of the industry have repeatedly advised the commission, CALEA compliance involves one of the most complicated sets of features ever developed by manufacturers. Today's decisions [which TIA generally supported] only add to the complexity and difficulty. A CALEA solution is not like buying a software program at the office supply store where you can go home and load the program onto your computer in a few minutes. Manufacturers are having to develop solutions that must interface with hundreds of different network elements while not crashing the telecommunications network." TIA Press Release dated August 29, 1999, available at <http://www.tiaonline.org>.

Although significant work has been undertaken by both Subcommittee TR45.2 and manufacturers to develop the necessary technical modifications to the J Standard to include the punchlist items, the Court's remand of four of those six items mandates that the manufacturers make modifications to the work that has been done. These modifications, at the very least, would include some sort of separation of the remanded items from the non-remanded items. Even if this were a relatively simple thing to do, which it is Joint Commenters' understanding that it would not be, such separation would be wasteful if the Commission ultimately readopts some or all of the punchlist items. At that point the manufacturers would be faced with trying to undo the undone.

As indicated above, as of the filing of these comments, the JEM has forwarded to TIA its final CALEA Packet Surveillance Report, but TIA has not finished its review of the report nor forwarded the report to the Commission. Therefore, no one knows exactly what the TIA will forward to the Commission in the way of a recommendation. Nonetheless, Joint Commenters note that the report that was forwarded to TIA contains many unanswered questions and does not fully address the concerns that the D.C. Circuit had with the J Standard as it relates to packet mode technologies. Review of the JEM fully supports a conclusion that it is highly unlikely that the issues relating to packet mode technology will be fully resolved in time to ensure that development and implementation of the solutions could occur by September of 2001.¹⁴ At most, the JEM report indicates that it *may* be possible to develop a filtering technology that will satisfy

¹⁴ Joint commenters note that the JEM report 1) does not address all packet mode technologies (report addressed only cdma2000, GPRS, and IP); 2) concludes that the solution proposed by law enforcement (the "Carnivore" system) had not been proven cost effective in cases where the subject's communications are part of a high bandwidth transmission and allowed for separation of the content from the call identifying information by law enforcement, rather than the carrier (thereby not solving the specific privacy issue that the Commission had raised; 3) indicates that separation of the content from the call identifying information "within a service provider's network may be unrealistic as it would be highly resource intensive, very inefficient and potentially inconsistent between providers"; and 4) concludes that a suggestion made by law enforcement that the Carnivore technology be introduced into the service-provider network raised significant operational and legal concerns.

the Commission's privacy concerns, but the report is lacking in specific recommendations on how to accomplish such filtering and indicates that further study is necessary into various filtering technologies and methods. In fact, much of the report discusses methods of filtering that law enforcement itself would do. Under the D.C. Circuit opinion that is not a viable solution to the privacy concerns of the Commission and in fact would violate CALEA.

The Commission is required to consider the cost of implementation of the CALEA requirements.¹⁵ If the Commission fails to grant on the CTIA petition, it would violate those provisions. There is simply too much uncertainty about both the remanded punchlist items and the possible filtering methods that would be applied to packet-mode technologies for the Commission to encourage or require manufacturers and carriers to continue their efforts to meet the September 2001 deadline.

Finally, the suspension of the compliance date would not interfere significantly with law enforcement's ability to protect the public from criminal activity. Carriers have always provided technical assistance to law enforcement authorized to conduct surveillance. This will continue. The vast majority of surveillance requests would continue to be fulfilled and the new capabilities created by the initial CALEA requirements will continue to be implemented in the interim.

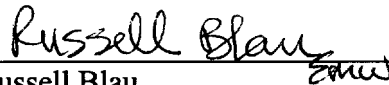
¹⁵ The D.C. Circuit, in its recent opinion, emphasized the Commission's responsibility to carefully consider the implementation costs of CALEA. The Commission is required to implement CALEA by "cost-effective methods" and to "minimize the cost of such compliance on residential ratepayers." 47 U.S.C. §§ 1006(b)(1) and (b)(3).

CONCLUSION

For the foregoing reasons the Commission should grant the CTIA petition to ensure that whatever CALEA requirements are ultimately adopted can be implemented in the most efficient manner, without undue financial hardship to manufacturers, telecommunications carriers and the public.

Respectfully submitted

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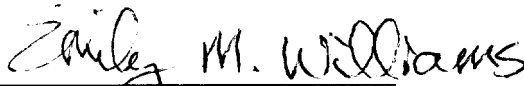
CERTIFICATE OF SERVICE

I hereby declare that on this 15th day of September, 2000, I served the following
Comments of PacWest Telecomm, Inc. and the Association for Local Telecommunications
Services via first class mail or by hand delivery (*) to the following.

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